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No. 99-1947

JUL 6 2000

In The

Supreme Court of the United States

ALEXANDRIA HISTORICAL RESTORATION AND PRESERVATION COMMISSION, ET AL.,

Petitioners,

v.

FEDERAL HIGHWAY ADMINISTRATION, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeal For The District Of Columbia Circuit

BRIEF *AMICUS CURIAE* OF THE COMMONWEALTH OF VIRGINIA IN OPPOSITION TO THE PETITION

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TABLE OF CONTENTS

Page

INTERESTS OF *AMICUS CURIAE* 1

REASONS FOR DENYING THE WRIT 2

Summary 2

I. THE PETITION IS BASED ON A THEORY CONTRARY TO THE LAW AND UNSUPPORTED BY THE RECORD 3

A. Congress Has Mandated a Twelve-Lane Bridge 3

B. A Ten-Lane Bridge is Both Inferior and Inadequate 4

1. Structural Concerns 4

2. Safety 5

3. Traffic Levels in 2020 6

4. Environmental Impact 9

II. THE DECISION BELOW DOES NOT CREATE A SPLIT IN THE CIRCUITS 11

A. The Decision Below Is Consistent With The Seventh Circuit 12

B. The Decision Below Is Consistent With The Eleventh Circuit 15

CONCLUSION 17

TABLE OF AUTHORITIES

Page

CASES

Citizens Against Burlington v. Busey, 938 F.2d 190 (D.C. Cir. 1991).....14, 15

City of Alexandria v. Rodney Slater, 198 F.3d 862 (D.C. Cir. 1999)..... *passim*

North Buckhead Civic Ass'n v. Skinner, 903 F.2d 1533 (11th Cir. 1990).....11, 15, 16

Simmons v. United States Army Corps of Eng'rs, 120 F.3d 664 (7th Cir. 1997).....11, 12, 13

Van Abbema v. Fornell, 807 F.2d 633 (7th Cir. 1986).....11, 12, 14

FEDERAL STATUTES AND REGULATIONS

40 C.F.R. § 1502.14 11

43 U.S.C. § 4332(2)(C) 11

National Environmental Policy Act of 1969 (42 U.S.C. § 4321 et seq.)..... 3

National Highway System Designation Act of 1995, Pub. L. No. 104-59 § 402, 109 Stat. 568 (1995) 7

Transportation Equity Act for the 21st Century, Pub. L. No. 150-107 § 1116(a)(2), 112 Stat. 107 (1998) 3

INTERESTS OF *AMICUS CURIAE*, THE COMMONWEALTH OF VIRGINIA

This case involves a dispute over the replacement of the Woodrow Wilson Bridge across the Potomac River. The bridge is a major crossing between Virginia and Maryland and a vital link in the Interstate highway system along the East Coast. Built forty years ago, the bridge is steadily deteriorating beneath traffic that far exceeds what it was designed to accommodate. Indeed, the bridge is weakening so rapidly that, four years from now, it will be structurally unsound. Everyone agrees that a new bridge is needed. Replacement plans have been studied and discussed for more than a decade. But there is still a dispute: should the new bridge have *twelve* lanes, as the Federal Highway Administration has decided? Or, should it have only *ten*, as petitioners would prefer?

Virginia is keenly interested in making sure that the bridge is replaced by a modern structure designed to accommodate foreseeable increases in traffic. Moreover, it is extremely important to Virginia for replacement to occur in time to avoid the calamity of bridge closure, or the expense and additional congestion of extensive repair. These objectives can be achieved if construction of a new, twelve-lane bridge can begin promptly. But, they will not be achieved if only ten lanes are built, or if bridge planners are required to delay construction until yet another round of studies can be completed. For these reasons, the Commonwealth of Virginia is vitally affected by the outcome of this case and urges the Court to deny the petition for writ of certiorari.

REASONS FOR DENYING THE WRIT

Summary

When this litigation began, the lead plaintiff was the City of Alexandria and an array of issues were raised. Now, the City has resolved its claims by settlement and, for the plaintiffs who remain, only one issue is left – whether their preference for a ten-lane bridge is entitled to more study. It is an issue without merit.

The petition is based on two fundamental errors. First, the petition is based on the theory that a ten-lane bridge would be just as good as one with twelve lanes, and that, consequently, more time should be spent studying a ten-lane option. The theory is faulty. It is contrary to the law and unsupported by the record. Congress has mandated a twelve-lane bridge. Even without such a mandate, it is clear from the record that a ten-lane bridge is both inferior and inadequate. Such a structure could not accommodate the increased volume of rush hour traffic projected for 2020, only a few years after completion of construction.

Second, petitioners perceive a split in the circuits where there is none. No circuit has required an agency to study options that do not satisfy the objectives with which it has been tasked. No circuit would regard deliberate obsolescence as a reasonable option, especially for a project that will cost well over a billion dollars and that, if designed right, should last for decades. The petition does not present an issue worthy of certiorari.

I. THE PETITION IS BASED ON A THEORY CONTRARY TO THE LAW AND UNSUPPORTED BY THE RECORD.

A. Congress Has Mandated A Twelve-Lane Bridge.

Congress has determined that the twelve-lane alternative selected by the Federal Highway Administration ("the Administration") shall be constructed. In 1998, Congress amended the Woodrow Wilson Memorial Bridge Authority Act of 1995. In so doing, it deleted earlier language regarding determination of alternatives for this project and explicitly defined the "project" to be "the selected alternative described in the record of decision executed by the Secretary [of Transportation] in compliance with the National Environmental Policy Act of 1969 (42 U.S.C. § 4321 et seq.)." Transportation Equity Act for the 21st Century, Pub. L. No. 105-178, § 1116(a)(2), 112 Stat. 107, 158 (1998). The alternative described by the Secretary *is* the twelve-lane bridge. Thus, Congress has now made the determination that the twelve lane alternative is the one to be constructed.

This congressional decision is also reflected in parts of the same legislation providing for an agreement between the federal government and the affected States: "[The agreement shall] require that – the Project include not more than 12 traffic lanes, including 8 general purpose lanes, 2 merging/diverging lanes, and 2 high occupancy vehicle, express bus, or rail lanes." *Id.* at § 1116(c)(2)(C)(i), 112 Stat. at 159. Considered in isolation, the reference to "not more than 12 traffic lanes" could be read as leaving open the option of a smaller bridge; but, by specifying *exactly* how many lanes of each type are to

be built, Congress foreclosed that option. Added together, the various lanes total twelve. Congress has plainly mandated a bridge of twelve lanes, no more and no less. The Court need go no further.

B. A Ten-Lane Bridge Is Both Inferior And Inadequate.

Even if Congress had not so acted, the petition would still rest on a faulty theory. In pressing their case for a ten-lane bridge, Petitioners make four claims. They say that "a ten-lane crossing would [1] eliminate structural concerns about the existing bridge, [2] sharply reduce the safety problems, [3] remove the current bottleneck, and substantially deal with projected traffic levels even twenty years hence, while [4] having far fewer adverse environmental effects." Pet. at 12. All of these claims are either wrong or irrelevant.

1. Structural Concerns. *Any* new bridge – if built in time – would remedy the structural problems that plague the existing bridge. But, that is not an argument in favor of *ten lanes* any more than it would be an argument in favor of six or eight lanes. Moreover, structural problems with the existing bridge argue *against* granting the petition. This is so for at least two reasons. First, there is the concern about timeliness. As petitioners apparently recognize, the existing bridge cannot last much longer without major repairs that would further snarl traffic and cost millions of dollars. While such repairs would be unavoidable, the money to pay for them would be largely wasted since a new bridge – of whatever size – would presumably replace the old one just a few years after the repairs

were made. Such adverse consequences weigh heavily against granting certiorari in this case.

Second, Virginia is concerned about structural problems arising in the new bridge if it is built too small. Much of the structural inadequacy of the existing bridge can be traced to the fact that the bridge has been forced to carry far more traffic than it was designed to accommodate. Completed in 1961, the design capacity of the bridge is 75,000 vehicles per day, a volume that was surpassed in the early 1970's and that is only a fraction of today's traffic count, 200,000 vehicles per day. As a result, the bridge wore out far sooner than expected. Building a new bridge that is inadequate to meet projected volumes invites a repetition of this problem. Moreover, building twelve lanes rather than ten will allow two lanes to be dedicated to high occupancy vehicles (known in beltway parlance as "HOV's") or mass transit, thereby encouraging a reduction in the total number of vehicles crossing the bridge.[1] Fewer vehicles mean less structural stress and consequently less damage. In short, structural concerns argue for a twelve-lane bridge and against granting certiorari.

2. Safety. The arguments about safety mirror those about structural concerns. *Any* new bridge – if built in time – would remedy the safety problems that plague the existing bridge. But, that is not an argument in favor of

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[1] Federal Highway Administration, U.S. Dep't of Transp., et al., Woodrow Wilson Bridge Improvement Study, Final Environmental Impact Statement ("Final EIS"), § 4(f) Evaluation. DC005053:2. References in this brief to "DC" and "SA" refer to the administrative record.

ten lanes. Indeed, safety problems with the existing bridge argue *against* granting the petition. First, the longer a new bridge is delayed, the longer motorists will be exposed to the traffic hazards of the overcrowded bridge they now must use. Those hazards would increase with the increased congestion that repairs to the existing bridge would cause. Second, as the court of appeals recognized, a twelve-lane bridge would be safer than one with only ten lanes. *City of Alexandria v. Rodney Slater*, 198 F.3d 862, 868 (D.C. Cir. 1999) (Pet. App. 9a-10a) ("accident rates would also be markedly higher on a ten-lane structure"). This decision supports the Administration's decision to eliminate a ten-lane option. As its study showed, such a bridge would be "insufficient from a functional, *safety*, and operational standpoint." Final EIS, § 4(f) Evaluation; Vol. 1, p. 2-43 (emphasis added).[2]

3. **Traffic Levels in 2020**. Petitioners claim – incorrectly – that a ten-lane bridge would "substantially" deal

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[2] The accident rate on the existing bridge is 153.5 accidents per million vehicle miles ("mvm"). DC003296:5-31. This is double the rate of other area highways. DC005053.3-3 to 3-32. Twelve lanes would reduce this rate to fewer than 100 accidents per mvm, while the accident rate for ten lanes would be between 125 to 150 per mvm. DC003296:5-31. Moreover, a twelve-lane bridge would allow the separation of local traffic from express traffic in a way that ensures that no vehicle would ever be more than one lane away from a shoulder. This increases safety for motorists, DC005053:2-27, and improves response time for emergency vehicles. DC003296:5-29. These benefits would be lost with a ten-lane bridge, since separation of local and express traffic would not be feasible.

with traffic in 2020.[3] Repeating the error of the district court, they fail to focus on the demands of rush hour. As the court of appeals recognized, the district court

> ignored this data, instead focusing exclusively on an Administration study showing that a ten-lane bridge would be able to accommodate up to 295,000 vehicles per day, a number only slightly smaller than the projected daily traffic flow on the bridge in 2020. But that study apparently assumed an even flow of traffic throughout the day (which, of course, is unrealistic). *Whatever the total number of vehicles that will cross in a 24 hour period, the relevant question is how long during peak commuting hours it will take to cross the bridge.*

Alexandria, 198 F.3d at 868 (Pet. App. 11a) (emphasis added).[4]

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[3] The relevance of the year 2020 arises, not only from the fact that it is now just a few years away, but also from the fact that Congress has made findings of fact about traffic problems at the bridge, focusing on the year 2020:

> " . . . the volume of traffic in the metropolitan Washington, D.C., area is expected to increase by more than 70 percent between 1990 and 2020 [and] the deterioration of the Woodrow Wilson Memorial Bridge and the growing population of the metropolitan Washington, D.C., area contribute significantly to traffic congestion . . . "

National Highway System Designation Act Of 1995, Pub. L. No. 104-59, § 402, 109 Stat. 568, 627 (1995).

[4] The Administration later refined its projected daily traffic flow for 2020, reducing the number down to 295,000 from an earlier figure that was somewhat higher.

Petitioners nonetheless cling to this inappropriate focus on 295,000 cars, hoping to downplay the great advantages that a twelve-lane bridge would have at rush hour. Pet. at 13. These advantages are shown by the following:

- With twelve lanes, rush hour would last a few hours twice a day; with ten lanes, rush hour in each direction could persist for up to fourteen hours. DC005053:figs.3-5, DC003296:figs. 4-7 and 4-8.

- With twelve lanes, the queues to enter the Beltway from Route 1 would be backed up for two lane miles; with ten lanes, the queues at Route 1 during evening rush hour would honeycomb through Old Town Alexandria for thirty-five lane miles. SA002869; DC003718.

- With twelve lanes, express lanes would be free flowing even during rush hour while the back-up in the local lanes would be two to three miles long. With ten lanes, there would be no express lanes and the rush hour queue would extend from three to six miles on the average weekday and several miles longer on days with accidents or breakdowns. DC003718; DC003291; DC003296:5-32 and 4-25.

- With twelve lanes, the total daytime delay would be 5,800 vehicle hours per day; with ten lanes, the delay would range from 9,500 to 10,700 vehicle hours per day. DC003718; DC003296:5-32.

- With twelve lanes, a vehicle in the express lanes during rush hour could travel through

> a five-mile corridor in only six minutes (an average speed of about 50 m.p.h.). In the local lanes, it would take 10 – 15 minutes (averaging 20 to 30 m.p.h.). DC003718; DC005053:4-16. By contrast, with ten lanes, it would take *all traffic* over twenty minutes to travel through that same five-mile corridor (an average of only about 15 m.p.h.). DC003718; DC003296:5-30; DC005053:4-143.

In sum, as the D.C. Circuit concluded, "[t]he Administration's studies show that [Petitioner's] preferred design (a ten-lane configuration without an HOV lane) would be able to accommodate *less than half of the per hour capacity* of the Administration's preferred alternative, causing peak-hour traffic queues of significantly greater length and extended duration . . . " *Alexandria*, 198 F.3d at 868 (Pet. App. 11a). While these concerns would not become acute until 2020, that day is not far away. Indeed, it would be, at most, only sixteen years after the completion of new construction. To build a major bridge so forseeably obsolete is poor stewardship of the public trust and not a "reasonable alternative" to the twelve-lane structure that petitioners seek to block.

4. Environmental Impact. Petitioners also claim that a ten-lane bridge would have "far fewer adverse environmental effects." Pet. at 12. This is also incorrect. A twelve-lane bridge would, of course, be larger than one with ten lanes, but any additional impact from the structure's size would be minimal. The footprint of a twelve-lane structure would be only sixty feet wider. DC005053:fig. 2-19. This would result in an aerial easement over Jones Point Park/Alexandria Historic District of only 1.3 more acres, and taking only .3 more acres of

the future Queen Anne's Park in Prince George's County. Similarly, twelve lanes would affect only 3.4 more acres of wetlands and 7.9 more acres of floodplain than ten lanes. There are an equal number of parks and historic sites that would be affected, an equal number of business displacements, equal air quality impacts, and equal hazardous material site impacts. DC005053:4-146 to 149.

In sum, a twelve-lane bridge would be superior to a ten-lane bridge in the areas of structural integrity, safety enhancement, carrying capacity, and decreased rush hour congestion, with differences in environmental impact being minimal. Indeed, a ten-lane bridge would be not only inferior, but inadequate. Given these facts, the theory on which the petition is based – that a ten-lane bridge would be just as good as one with twelve lanes – is faulty. Indeed, the Administration has already looked at a ten-lane option. The Final EIS discussed the environmental savings of the ten-lane alternative over the twelve-lane and showed that any savings were insubstantial and were offset by the transportation and safety benefits of twelve lanes. DC005053:2-47. No further study is required. As the court of appeals observed,

> [W]ere [the Federal Highway Administration] to build a ten-lane bridge, no one else would step in and alleviate the congestion that would result. In this context, it is simply a *non sequitur* to call a proposal that does not "offer a complete solution to the problem" a "reasonable alternative."

Alexandria, 198 F.3d at 869 (Pet. App. 13a). The petition should be denied.

II. THE DECISION BELOW DOES NOT CREATE A SPLIT IN THE CIRCUITS.

Petitioners discern a split in the circuits where none exists. They argue that the decision below represents a departure from the approach taken by Seventh and Eleventh Circuits in similar cases. *See* Pet. at 8-13, discussing *Simmons v. United States Army Corps of Eng'rs*, 120 F.3d 664 (7th Cir. 1997); *Van Abbema v. Fornell*, 807 F.2d 633 (7th Cir. 1986); *North Buckhead Civic Ass'n v. Skinner*, 903 F.2d 1533 (11th Cir. 1990). In reality, the D.C. Circuit's approach parallels the course taken by those other circuits. Although those circuits have not always ruled for the federal agency, they have followed a similar pattern of analysis. There is no split.

Under the National Environmental Policy Act ("NEPA"), federal agencies must prepare an environmental impact statement for all "major federal actions significantly affecting the quality of the human environment. . . . " 42 U.S.C. § 4332(2)(C). This statement must discuss "all reasonable alternatives" for pursuing a project. 40 C.F.R. § 1502.14. When deciding whether a federal agency has validly excluded a proposal from its discussion of "all reasonable alternatives," the circuits have followed a two-step approach. First, they have determined whether the agency's goals are reasonable. Then, they have judged the reasonableness of proposed alternatives by the goal of the project. This is the approach that was taken by the Seventh and Eleventh Circuits when dealing with the cases cited by petitioners. No split exists because this is the same approach followed by the court of appeals here.

A. The Decision Below Is Consistent With The Seventh Circuit.

Contrary to petitioners' assertions, the court of appeals' decision does not contravene the Seventh Circuit's opinion in *Simmons*, or its opinion in *Van Abbema*. In *Simmons*, the Seventh Circuit considered whether the Corps of Engineers had complied with NEPA when the Corps prepared an environmental impact statement for a project to bring water to a city and a neighboring water district. The court concluded that the Corps had not complied with NEPA because the goal of the project was too narrowly defined. *Simmons*, 120 F.3d at 669. The Corps defined the objective in a way that actually dictated the means or method for achieving the goal – it stated that water must be obtained *via a single source*. *Id.* The Seventh Circuit held that the defined objective was unduly narrow because it precluded any alternative methods for obtaining water. *Id.*

The court of appeals' decision here does not conflict with *Simmons*. The defined objective in this case differs from the one considered in *Simmons* because the Administration's objective does not explicitly or implicitly dictate any means or method. The Administration seeks to relieve the traffic congestion and attendant structural and safety problems that plague the Woodrow Wilson Bridge, and to accommodate the traffic volumes expected by the year 2020. Unlike the Corps in *Simmons*, the Administration did not start with any specified means for achieving its goal. While the Administration eventually concluded that twelve lanes were necessary to achieve its goal, it did not start by defining twelve lanes *as* its goal. Instead, it

looked at a variety of bridge widths, as well as a bridge/tunnel option, a double-deck bridge option, a tunnel only option, etc. Final EIS § 4(f) evaluation, 2-10 – 2-17 (1997). The ten-lane option was eliminated as an alternative because it was not a reasonable option in view of the general goals regarding traffic congestion, structural and safety problems and projected needs in the year 2020. Given the different approaches followed by the Corps in *Simmons* and the Administration here, it is not surprising that the circuits reached different conclusions about whether there was compliance with NEPA. But this does not indicate any split on an issue of law.

Moreover, there is no reason to believe that the Seventh Circuit would have reached a result here different from the one reached by the D.C. Circuit. The *Simmons* court did not hold that the Corps had improperly defined its objective because it sought to solve the water problem in a *complete* manner, nor did it say that the Corps was precluded from taking into account peak demand for water. Yet, petitioners essentially contend that the Administration's objective is unacceptable because it seeks to address the problem of congestion fully, and by taking rush hour into account. Petitioners maintain that the Administration should be content to accommodate only a *portion* of the traffic that would cross a new bridge in the foreseeable future. Only then, according to petitioners, would the Administration's objective be sufficiently broad. The Seventh Circuit did not adopt such an unreasonable approach in *Simmons*, and no split among the circuits was created when the D.C. Circuit declined to adopt it here.

The Seventh Circuit's decision in *Van Abbema* similarly provides the petitioners with no support. In *Van Abbema*, the Seventh Circuit considered whether the Corps of Engineers had followed NEPA when it issued a permit to build and operate a coal-loading facility. The court held that the Corps had not complied with NEPA because, when it considered alternate sites, the Corps relied on "a record replete with important factual inconsistencies and ambiguities that the Corps did not attempt to resolve." 807 F.2d at 642. No such adverse finding was made by the D.C. Circuit here.

Petitioners cite the statement in *Van Abbema* that "the evaluation of 'alternatives' mandated by NEPA is to be an evaluation of alternative means to accomplish the *general* goal of an action." *See* Pet. at 9, quoting 807 F.2d at 638 (emphasis in original decision). But, there is nothing to suggest that the agency goals here – relieving traffic congestion and attendant structural and safety problems, and accommodating traffic volumes expected by 2020 – would be too specific to satisfy the Seventh Circuit. Thus, the D.C. Circuit's decision does not conflict with *Van Abbema*.

Finally, Petitioners argue that the D.C. Circuit created a split with the Seventh Circuit in an earlier case, *Citizens Against Burlington v. Busey*, 938 F.2d 190 (D.C. Cir. 1991). They say that the D.C. Circuit "expressly disagree[d] with the Seventh Circuit's view in *Van Abbema* that the reasonableness of alternatives should be judged by the 'general goal' of the project." Pet. at 13. In reality, the discussion in *Citizens* about the "general goal" of a planned project centered on the issue of who holds the right to *define* the goal. The D.C. Circuit never disagreed

with judging the reasonableness of a proposed alternative by the general goal of the project. In fact, the court explicitly embraced this approach, stating that "[t]he goals of an action delimit the universe of the action's reasonable alternatives," *Citizens*, 938 F.2d at 195, and that "[a] proposed alternative is reasonable only if it will bring about the ends of the federal action. . . . " *Id.* Moreover, it is the recent decision in the case at bar – not the decade-old decision in *Citizens* – that is now before this Court on a petition for writ of certiorari. That petition should be denied.

B. The Decision Below Is Consistent With The Eleventh Circuit.

Petitioners' reliance on the Eleventh Circuit's decision in *North Buckhead* is similarly misguided. Petitioners contend that the court of appeals contravened *North Buckhead* when it concluded that the "partial" ten-lane proposal is not a "reasonable alternative" worthy of in-depth discussion in the Administration's environmental impact statement. Pet. at 10, citing 903 F.2d at 1542. In reality, the D.C. Circuit's conclusion is consistent with the *North Buckhead* opinion.

In *North Buckhead*, the Eleventh Circuit stated that a discussion of proposed partial solutions might sometimes be appropriate. 903 F.2d at 1542. But, in that opinion, the court also stated that the propriety of considering such proposals depends on whether they constitute *reasonable* alternatives. *Id.* The Eleventh Circuit went on to conclude that a proposed "partial" plan of action did not constitute a reasonable alternative because it would not accomplish

the objective underlying the highway project – "it would provide little relief for the congestion in the existing street network." *Id.* Given this holding, there are at least two reasons why there is no conflict between *North Buckhead* and the case at bar. First, the Eleventh Circuit's view that a partial solution may sometimes be a reasonable alternative was not essential to its holding in the case. As such, it does not provide a credible basis for discerning a conflict among the circuits.

Second, in the context of highway construction projects, the Eleventh Circuit and the D.C. Circuit agree that a partial solution that does not relieve congestion is not a reasonable alternative. The D.C. Circuit correctly recognized that, with an expansion to only ten lanes, "*congestion . . . would result* [and] it is simply a non sequitur to call a proposal that does not offer a complete solution to the problem a 'reasonable alternative.' " *Alexandria*, 198 F.3d at 869 (Pet. App. 13a) (emphasis added, internal quotation marks and footnote omitted). There is no split among the circuits.

Moreover, the D.C. Circuit – like the Seventh Circuit – was *right* in its approach. Although ten lanes would better accommodate the traffic that *currently* passes over the bridge, the volume of traffic is going to increase. Ten lanes cannot accommodate the increase that is expected by the year 2020. It took slightly more than ten years for traffic to exceed the capacity of the Woodrow Wilson Bridge after construction was finished in 1961. If only ten lanes are built now, the bridge would again be inadequate to handle traffic demands shortly after completion. The same congestion that plagues the bridge today would plague it in 2020. The Administration would essentially

be back to square one.[5] This Court should deny the petition for writ of certiorari.

CONCLUSION

No one contests the need to replace the Woodrow Wilson Bridge. All that is at issue is whether the new bridge should have twelve lanes or ten. Try as they might, petitioners cannot make this into a case worthy of certiorari. The petition ignores the congressional mandate for twelve lanes as well as the painful reality of rush hour, a fact of life that all who drive in Northern Virginia know all too well. Insensitive to highway congestion, petitioners are nevertheless so alert to conflicts among the circuits that they see one where none exists. There is no reason to believe that any other circuit would reach a different result than the legally sound and common sense result reached here by the D.C. Circuit. There is no split

[5] While the negative impact on transportation would be significant, the environmental benefits gained from limiting the expansion to ten lanes would be minimal or non-existent. *See supra* at 9.

in the circuits. The petition for certiorari should be denied.

July 6, 2000.

Respectfully submitted,

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